IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH NAGPUR

Second Appeal No. 537/2004

Office Notes, Memoranda of Coram, appearances, Court's orders or directions and Registrar's orders. : Court's or Judge's orders

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CORAM : A.P. Lavande, J.
Dated : November 17, 2006

Heard Mr. S.R. Deshpande, Advocate for the appellants.

By this appeal, the appellants – original defendant nos. 1 and 2 challenge the judgment and decree dated 4th August 2004 passed by Additional District Judge, Washim dismissing the appeal filed by the appellants-defendants against judgment and decree dated 8.10.1996 passed by Joint Civil Judge, Junior Division, Washim partly allowing the suit filed by Kalawati Surushe against appellants-defendants and one Janardhan Dekhane who was defendant no.3 in the said suit.

Kalawati filed the above suit for declaration that gift deed dated 4.12.1987 executed by her in favour of defendant no.1 be declared null and void and for permanent

injunction restraining the defendants from disturbing her possession over the suit property and also seeking possession of the suit house. Original plaintiff died during the pendancy of the suit and Narayan Zunzare was brought on record as legal representative of said Kalawati. Narayan Zunzare died during pendency of this appeal and his legal representatives have been brought on record. According to original plaintiff Kalawati, defendant no.2 got gift deed dated 4.12.1987 executed in favour of the defendant no.1 by playing fraud upon her. The suit was contested and after appreciating the evidence led by the parties, the trial Court partly decreed the suit. The trial Court held that gift deed dated 4.12.1987 was got executed by defendant no.2 in favour of defendant no.1 by playing fraud upon original plaintiff and the trial Court declared the said gift deed null and void and consequently granted injunction restraining the defendants from obstructing the possession of the plaintiff over the suit land. The trial Court, however, rejected the

prayer of the plaintiff for recovery of possession of the suit house. The trial Court also dismissed counter claim of the defendants for recovery of possession of suit land. The lower appellate Court dismissed the appeal filed by defendant nos. 1 and 2 concurring with the finding given by the trial Court. The appellate Court, after considering the evidence on record, held that the gift deed was got executed by defendant no.2 in favour of his son defendant no.1 by playing fraud upon original plaintiff Kalawati. This finding, was given after considering several facts, namely:-

(i) that the gift deed was executed within three days of the death of her husband Sakharam;

(ii) The gift deed was executed at far way distance where possibly the plaintiff would not have gone of her own accord within three days of the death of her husband.

(iii) There was no reason for the plaintiff Kalawati to execute the gift deed since the relationship between the parties could not

establish love and affection on the part of the plaintiff in favour of defendant no.1.

(iv)There was no delivery of the property even after the execution of the gift deed.

The lower appellate Court also recorded finding that the plaintiff was entitled to revoke the gift deed since the obligations mentioned in the gift deed were not discharged by defendant no.2.

Mr. Deshpande, learned counsel for the appellants urged three grounds in support of this appeal. Firstly, he submitted that the plaintiff had not given details of fraud played upon her which vitiated the gift deed. Therefore, both the Courts below were not justified in holding that gift deed dated 4.12.1987 was null and void. He further submitted that the plaintiff had no right to revoke the gift deed, if the obligations mentioned in the gift deed were not carried out by the donee. Lastly, he submitted that Narayan Zunzare who was brought on record in the suit after death of original plaintiff Kalawati had no right or title to the suit

property and as such he could not have been brought on record as legal representative of the deceased Kalawati.

I have considered the submissions made by learned counsel and perused the records. Perusal of the plaint discloses that there is substantial compliance regarding pleadings about fraud played by defendant no. 2 while executing the gift deed in favour of defendant no.1. Moreover, the circumstances mentioned by the lower appellate Court to hold that the gift deed was null and void on account of fraud played by defendant no.2 upon original plaintiff have been established by the plaintiff and if all the circumstances are taken into consideration, in my opinion, the finding given by both the Courts below that fraud was played upon original plaintiff cannot be said to be perverse warranting interference in second appeal. In my opinion, the finding given by both the Courts below that gift deed was vitiated by fraud on the part of defendant no.2 is a finding based upon proper appreciation of evidence led by the parties

which have been arrived at after considering all the probabilities of the case. Therefore, I do not find any merit in the submission of Mr. Deshpande that the finding of fraud is vitiated as alleged by him. Once the finding of fraud is up-held, the second ground urged even if decided in favour of the appellant/plaintiff does not advance his case any further. In any event, the finding given by the lower appellate Court in respect of right of the plaintiff to revoke the gift deed cannot be faulted having regard to the evidence on record as well as the legal position. I, therefore, find no merit in the second submission also.

Insofar as the submission of Mr. Deshpande that Narayan Zunzare had no title to the suit property and as such he could not have been brought on record as legal representative of deceased plaintiff, I do not find any merit thereof. Firstly, such ground was not raised either before the trial Court or before lower appellate Court. Therefore, the appellant cannot be permitted to urge this ground for the first time in second appeal.

For the reasons stated above, I do not find any ground to interfere with the impugned judgments and decrees in exercise of jurisdiction under Section 100 of the Code of Civil Procedure. No substantial question of law is involved in the appeal. Hence, the appeal is summarily rejected.

JUDGE

A.